

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

APR 17 1996

In the Matter of)	
)	
Amendment of Part 20 and 24 of the Commission's)	WT Docket No. 96-59
Rules -- Broadband PCS Competitive Bidding and)	
the Commercial Mobile Radio Service Spectrum Cap)	DOCKET FILE COPY ORIGINAL
)	
Amendment of the Commission's Cellular/PCS)	GN Docket No. 90-314
Cross-Ownership Rule)	

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits reply comments in the above-referenced proceeding in response to comments filed on April 15, 1996.^{1/} Specifically, Cox addresses herein the extent to which the Federal Communications Commission ("FCC" or "Commission") should modify its spectrum cap rules and related attribution standards.

I. Introduction

In a Notice of Proposed Rulemaking adopted on March 20, 1996, the FCC solicited comment on whether it should retain its cellular/PCS cross-ownership rule and attribution standards or adopt a single CMRS spectrum cap that would limit all CMRS providers to 45 MHz of CMRS spectrum.^{2/} In particular, the Notice requested comment on whether there are reasons

^{1/} Cox holds a PCS pioneer preference license for the Los Angeles/San Diego MTA and also was a successful bidder for the Omaha MTA license in the A and B Block auction held last year.

^{2/} See Notice of Proposed Rulemaking, Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular PCS Cross-Ownership Rule, WT Docket No. 96-59; GN Docket No. 90-31, FCC 96-119 (adopted and released March 20, 1996). Under current rules, PCS, cellular and SMR spectrum is aggregated for purposes of

026

for maintaining the separate spectrum cap on cellular providers' ownership of PCS spectrum in their service areas.^{3/}

Cox urges the FCC to retain without modification its previously adopted cellular cross-ownership rule and attribution standards. As demonstrated in the comments filed on April 15, there is more than adequate record support to preserve the restriction based on the FCC's policy to promote competition in the CMRS marketplace and disseminate licenses among a wide variety of spectrum applicants.

II. The FCC Should Retain the PCS/Cellular Cross Ownership Rule Limiting In-Region PCS Holdings to 10 MHz Licenses.

As recognized by commenters in this proceeding, it is not unusual for the FCC to adopt rules that limit the extent to which incumbent providers of communications services may participate in the provision of related, potentially competitive new services. The FCC, on numerous occasions, has imposed such cross-ownership restrictions in order to prevent anti-competitive activity that would stifle new technologies and the introduction of innovative services by new market entrants. For example, the FCC imposed a broad prohibition on the provision of MMDS service by cable operators in their cable service areas to promote the development of local competition to established cable operators.^{4/}

determining compliance with the Commission's 45 MHz CMRS spectrum cap. See 47 C.F.R. § 20.6 (1995).

3/ The Notice was released following a remand of the issue to the FCC by the Sixth Circuit Court of Appeals in November 1995. See Cincinnati Bell Telephone Company v. FCC, 69 F.3d 752 (6th Cir. 1995).

4/ See Report and Order, 5 FCC Rcd 6410, 6417 (1990); Order on Reconsideration, 6 FCC Rcd 6764 (1991); Second Report and Order, 6 FCC Rcd 6792 (1991). The cable/MMDS cross-ownership rule was codified in the 1992 Cable Act and retained in the Telecommunications Act of 1996 in areas where cable operators are not subject to "effective

Similarly, when cable television itself was a fledgling service, the Commission decided that it was necessary to prohibit television broadcast network and co-located television broadcast stations from owning and operating cable systems. These measures were taken to prevent broadcasters from stifling the growth and attractiveness of a potential competitor in the provision of video programming. Significantly, the FCC determined that a prophylactic rule was necessary to prevent broadcasters from acquiring cable systems, even in the absence of evidence that cable "abuses" were taking place.^{5/}

A similar approach should be applied to PCS. In its nascent stage of development, PCS requires regulatory safeguards if the service is to achieve its competitive potential. The Commission consistently has recognized PCS as a competitor in the wireless marketplace capable of providing the public with choice among mobile service carriers and holding the promise of local exchange competition. Removing the cellular/PCS spectrum cap or expanding the existing cap threatens the development of PCS as a stand-alone competitor to cellular and

competition." See Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, 8 FCC Rcd 6828, 6841 (1993) ("Cable/MMDS Cross-Ownership Order") (citing S. Rep. No. 92, 102d Cong., 1st Sess. 46 (1992), reprinted in 1992 U.S.C.C.A.N. (106 Stat.) 1460); see also S. Rep. No. 92, 102d Cong., 1st Sess. 47 (1991) (Existing cross-ownership rules "enhance competition" and purpose of proposed cable-MMDS rule is to prevent cable from "warehousing potential competition"); see also Telecommunications Act of 1996, Section 202 (1996).

^{5/} See Memorandum Opinion and Order, In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relating to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and /or Legislative Proposals, Docket No. 18397, 39 FCC 2d 377, 391-392 (1973). The statutory prohibition recently was eliminated because cable has become a widely-accepted alternative to traditional broadcast service. See Telecommunications Act of 1996, Section 202(i) (1996). The FCC's cable/broadcast cross-ownership rules remain in effect.

could relegate it to secondary status as a complementary service offered by cellular providers to their established customer base.^{6/}

There is no doubt that cellular providers wield significant power in the CMRS marketplace.^{7/} In an environment with only two competitors licensed and operating for over 10 years, cellular carriers have grown to enjoy the benefits of duopoly status. As recognized by both the Department of Justice and the FCC, cellular providers have faced little competition throughout their development -- a result fortified by overlapping alliances among cellular carriers in which "competing" carriers in some markets partner with each other in others.^{8/} Recent and announced mergers of cellular holdings only have enhanced resources now available to pursue and obtain PCS spectrum. Moreover, because cellular providers were never required to participate in an auction to acquire their 25 MHz of spectrum, they are financially advantaged vis-a-vis new PCS entrants in aggregating broadband CMRS spectrum.^{9/}

^{6/} Without the cross-ownership rule to enhance its competitive vigor, PCS may experience the same fate as cellular in failing to become an alternative to the landline communications network. LEC involvement in the provision of cellular services meant that LEC cellular affiliates were never incited to compete with their corporate parents for local service customers.

^{7/} See First Report, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, FCC 95-317 (adopted July 28, 1995, released August 18, 1995) (recognizing that the cellular duopoly system created by the FCC led to only limited competition in cellular telephone markets); see also Second Report and Order, Regulatory Parity, 9 FCC Rcd 1411, 1467 (1994) ("[T]he record does not support a conclusion that cellular services are fully competitive.").

^{8/} See Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers at 14-15, United States v. Western Electric Co., Civ. Action No. 82-0192 (HHG) (D.D.C., filed July 25, 1994).

^{9/} Further, any move to adopt a single CMRS spectrum cap, and eliminate the PCS/PCS and cellular/PCS spectrum aggregation restrictions, must address the inherent advantage afforded cellular carriers to aggregate 45 MHz of spectrum based on their current spectrum

In the early stages of PCS, it was recommended by the GAO that the FCC establish a policy that would give first preference to PCS licenses to firms that were not current cellular licensees.^{10/} A limitation was supported by a vast number of comments filed during the initial proceeding on this issue in 1992, and the FCC ultimately agreed. There is no reason now to change course. It is still the case that unrestricted cellular participation in PCS will be detrimental to wireless competition and inconsistent with the Congressional mandate to promote diversity in the assignment of PCS spectrum.^{11/} Eliminating the cross-ownership rule will decrease the spectrum available to new service providers and stifle the ability of emerging competitors to make sophisticated broadband applications available to their subscribers.^{12/}

holdings. While cellular could easily aggregate PCS spectrum to reach the CMRS spectrum cap (e.g. two 10 MHz PCS licenses), PCS providers will be able to acquire the same amount of spectrum only if they aggregate SMR frequencies. Accordingly, if a single CMRS spectrum cap is adopted, the FCC must provide for spectrum disaggregation to facilitate PCS aggregation to 45 MHz.

^{10/} See Prepared Statement of Regina Markey Keeney, Chief, FCC Wireless Telecommunications Bureau, Hearing Before the Subcommittee on Oversight and Investigation of the Committee on Commerce House of Representatives, 104th Congress, 1st Sess., Serial No. 104-43 at 20 (Oct. 12, 1995).

^{11/} At least one commenter has recognized that there is no real need for cellular carriers to acquire additional broadband spectrum except to hinder the development of wireless competition, particularly when 20 MHz of additional spectrum may pose technical problems for cellular providers. See e.g., Comments of PersonalConnect Communications, L.L.C. at 4 (filed April 15, 1996) ("Cellular carriers owning 25 MHz per market, in light of their conversion to digital technologies, extensive use of microcells and assuming efficient spectrum utilization, should not have any need for additional spectrum for mobile voice or data services"). Even companies with cellular interests have conceded that frequency separations between PCS and cellular spectrum require specialized dual-band phones that will be "more costly and less convenient" for users than single-band PCS equipment. See Comments of BellSouth at 5.

^{12/} See Comments of PersonalConnect Communications, L.L.C. at 4 (filed April 15, 1996) ("The principle reasons for existing cellular and PCS carriers to obtain D, E and F Block licenses is the speculative warehousing of spectrum for possible long term uses and to block potential competitors, including Designated Entities, from obtaining spectrum."). In contrast,

Increasing the ability of cellular providers to compete for and obtain PCS spectrum also undermines the business strategies and service plans of prospective competitors who acquired PCS spectrum because of the opportunity to establish competing wireless services systems. Decisions regarding target markets, capital needs, marketing requirements and prices paid for PCS spectrum were based on the good faith reliance of new entrants on the FCC's rules limiting cellular access to PCS spectrum and on the premise that incumbent cellular providers would not be able to supplement their already considerable wireless holdings to overwhelm the capabilities of new entrants. Opening PCS markets to cellular duopolists completely at this late date will make PCS a more speculative venture that few financial institutions will choose to finance.^{13/}

II. The FCC Should Maintain the 20% and 40% Attribution Standards As Appropriate Thresholds With Which to Effect Attribution of Cellular Interests.

The FCC should retain the attribution thresholds applied to prior PCS auctions. Specifically, the FCC should confirm its 20% threshold (and 40% attribution threshold for interests held by or in small businesses) as an appropriate standard to determine cellular attribution. In addition, the Commission must reaffirm its prior determination as a product of rational and supportable regulatory decision-making.

retention of the current rules will allow limited cellular participation without threatening the success of PCS.

^{13/} Moreover, arguments that the effects of eliminating the cellular/PCS cross-ownership rule will be minimal because the A and B Block PCS licenses have already been assigned are misleading. See Comments of BellSouth at 7 (filed April 15, 1996). Lifting the prohibition at this stage may undo the diversity accomplished by the A and B Block auctions as cellular providers aggressively seek additional licenses post-auction, perhaps through future disaggregation of spectrum or partitioning of PCS markets.

A number of commenters argue that the Commission should replace its bright-line attribution standard with a "controlling interest" test that would analyze on a case-by-case basis the eligibility of a cellular provider to compete for PCS licenses. Such a proposal, however, is subject to undetectable manipulation. Indeed, the standard would be ineffective in restraining cellular participation in PCS. Commenters already have recognized the practical difficulty of making de facto licensee control determinations in the C Block auctions.^{14/} Extending these determinations to the remaining PCS auctions to judge the extent of cellular participation, a factor critical to the competitive development of PCS, only will make enforcement of the limitation more difficult.

Finally, bright-line attribution rules traditionally have been used by the Commission as an effective and efficient means of identifying cognizable opportunities for influence and control. In fact, it is not unusual for the FCC to adopt even lower bright-line attribution standards than those applied in the cellular/PCS context.¹⁵ As recognized by DCR Communications, Inc., the FCC has adopted an attribution standard of five percent in other contexts including broadcast, cable operator/broadcast network, cable national subscriber limits,

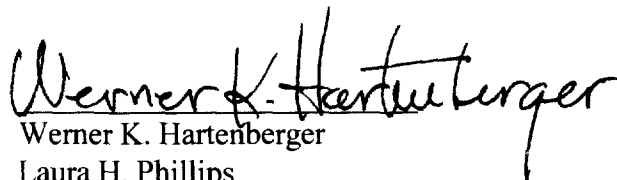
^{14/} See e.g. Comments of Iowa, L.P. at 4 (filed April 15, 1996); Comments of Mountain Solutions at 6 (filed April 15, 1996).

^{15/} In applying the cable/MMDS ownership prohibition, for example, the FCC adopted a 5% attribution standard and expressly declined to adopt a "single majority shareholder exception" to the rule. See Cable/MMDS Cross-Ownership Order, 8 FCC Rcd at 6843; see also Report and Order, MM Docket No. 83-46, 97 FCC 2d 997, 1006-07 (1984) (recognizing that high attribution standards involve a significant risk of overlooking influential stockholders for many corporations). Moreover, in the Telecommunications Act of 1996, Congress confirmed that a bright-line test of 10% is appropriate for determining "ownership" or "control" of an "affiliate." See Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.A.N., Section 3(a)(2)(33), (110 Stat.) 56.

cable channel capacity and even for the attribution of PCS spectrum (a standard that remains unchallenged).^{16/} Nevertheless, in the PCS context, it was cellular's unique historical development and the FCC's concern that the rules not be overly-restrictive, that a more lenient attribution standard was adopted.^{17/} Based on its long-standing policy to promote competition through the application of bright-line attribution benchmarks, the Commission should reaffirm its findings that a 20% attribution standard is an appropriate test for judging cellular participation in the PCS marketplace.

Respectfully submitted,

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^{16/} See Comments of DCR Communications, Inc. at 14-15 (filed April 15, 1996).

^{17/} Indeed, the attribution standard adopted for cellular entry into PCS is less strict than even the 10% standard currently being considered by the FCC in the broadcast context. See Notice of Proposed Rulemaking, 10 FCC Rcd 3606 (1995).

CERTIFICATE OF SERVICE

I, V. Lynne Lyttle, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 25th day of April, 1996, I caused copies of the foregoing "Reply Comments of Cox Communications, Inc." to be served via hand delivery to the following:

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